UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-068 22 0206-D7
Issued to: Francisco C. AGUILAR

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2117

Francisco C. AGUILAR

This appeal has been taken in accordance with 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 9 March 1977, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for twelve months outright plus twelve months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as AB seaman on board SS SANTA CLARA under authority of the document above captioned, Appellant:

(1) at about 0315, 31 July 1976, at Cartagena, Colombia, wrongful fail to turn to for assigned undocking duties;

(2) on 31 July 1976, at sea, wrongfully fail to performdutieson the 0400-0800 watch;

(3) on 1 August 1976, at Cristobal, C.Z., wrongfully fail to turn to for undocking duties and to perform on the 1600-2000 watch.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of SANTA CLARA.

In defense, Appellant offered in evidence medical records, voyage records of other vessels, and two letters, and testified in his own behalf.

At the end of the hearing, the Judge rendered a decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant as recited above.

The entire decision was served on 25 April 1977. Appeal was

timely filed, and perfected on 17 November 1977.

FINDINGS OF FACT

On all dates in question, Appellant was serving as an AB Seaman on board SS SANTA CLARA and acting under authority of his document.

On 31 July 1976, at Cartagena, Columbia, Appellant wrongfully failed to turn to for assigned duties at 0315 in connection with the unmooring and getting underway of the vessel. That same morning he wrongfully failed to appear for and to perform duties at his assigned 0400-0800 sea watch.

On 1 August 1976, while the vessel was at Cristobal, C.Z., Appellant failed to perform his duties on the assigned 1600-2000 watch, during the course of which he also failed to perform his duties in connection with the unmooring and getting underway of the vessel at about 1930.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

(1) The official log book entries relied on as evidence were so full of error as to render them insufficient to constitute the substantial evidence required as a basis for findings;

(2) The Administrative Law Judge erred in not relying upon medical evidence that Appellant's apparent failures to perform duties were justified by his illness;

(3) The official log book entries in evidence were violative of the National Labor Relations Act and hence do not constitute substantial evidence to support the findings made.

APPEARANCE: Tabak, Steinman and Mellusi, New York, N.Y., by Ralph J. Mellusi, Esq.

OPINION

I

To appreciate the import of Appellant's principal contention here, that the official log book entries relied on for the findings as to the "proved" specifications were so contaminated that they could not constitute "substantial evidence" of the offenses

alleged, it is necessary to note that two specifications of misconduct originally preferred were not proved and as a consequence were dismissed. It is Appellant's position that the reasoning of the Administrative Law Judge leading to his conclusions as to those matters requires, by logical application, the rejection of the rest of the evidence, which was of the same character.

A minor point not meriting much attention may be disposed of first. Appellant urges that the official log book is an entity, such that one flaw contaminates the whole and, as a lesser grouping, that since the entries relative to him follow from the first to the last without interruption by other entries in the book they constitute themselves one record of one continuous transaction, so that the whole relative to him falls with the deficiency in part found by the Administrative Law Judge.

The official log book of a vessel is not a monolithic thing; its contents are governed by a variety of statutes and entries are made for different purposes and in different manners. The more general contention of Appellant here has no merit whatsoever. With respect to the urged unity of the entries relative to him, it suffices to say, first, that he can look to no benefit from the fact that no record of misconduct of another person was found appropriate to interrupt the series of records of his misconduct and that even the entries made as to him are separate and distinct on their face, made at different times and under different circumstances. This is not to say, however, that in particular case involving a patent fraud, for example, a kind of defect might not weaken the effect of other parts of the record.

It is recognized that it is this latter consideration that Appellant is relying on here, that, without amounting to a finding of "fraud", the theory given for the rejection of the material relative to the dismissed specifications logically should apply to the rest. This calls for some review of the treatment of the several entries, both as to their contents and the rules governing their use in these proceedings.

II

With a single exception, each "entry" appears, in the form adopted by the master for compliance with the statute, as two "entries," one recording the substantive matter to be covered, the other recording the procedural matter as to notification to the seaman whose conduct has been made the matter of record and the seaman's reply. Each substantive portion of an entry and each statement of procedure is separately signed by the master and, according to the master's policy in these cases, by both the chief

mate and the purser. For each substantive entry and for each procedural entry, there is recorded in the left hand column of the page, a date, a place, and an hour. In each case the "procedural" entry follows immediately, without intervening material, after the substantive entry to which it refers.

The first pair of "entries" (or "the first entry," as it could properly be called if a correct appreciation of the format is had) deals with the matters alleged in the first two specifications: the failure to perform during the undocking and the failure to stand the morning watch on 31 July 1976.

The second pair (or "second entry") deals with the failure to perform during undocking and the failure to stand the 1600-2000 watch on 1 August 1976, both matters alleged in the third specification, presumably because the undocking maneuver occurred during the assigned watch period and not earlier than the assigned watch period as was the case with the 31 July duties.

Both of these entries or "pairs of entries," were accorded by the Administrative Law Judge the full weight of entries made in substantial compliance with the controlling statutes as specified at 46 CFR 5.20-107 and on that basis he found proved the first three specifications.

The third pair of entries (or "third entry") records that Appellant failed to "turn to" for his 0400-0800 watch on 2 August 1976. It also records declarations made by Appellant in connection with his duties on that occasion. (This matter of the 0400-0800 watch on that date was covered in the charges by the fourth specification, which also included a further failure to stand watch, 1600-2000, on the same date, the grouping apparently being on the basis that the two watch failures occurred on the same date.) The marginal identification for this substantive entry reads "August 2 - 1976 IN BASIN AT BALBOA VESSEL MANEUVERING 0345 Hrs." The accompanying procedural entry, following immediately below the substantive entry and reciting the fact of notification to the seaman and his opportunity to reply, carried the marginal identification "Lat. 05-42N. Long. 80-00 W. Aug. 2 - 1976 1500 hrs."

The fourth entry records a failure to stand the 1600-2000 watch on 2 August 1976 and a failure to stand the 0400-0800 watch on 3 August 1976. It records also a complaint of illness made by Appellant and a declaration by him that he would not be able to stand his 1600-2000 watch on that date of confrontation with the log entry, 3 August. This entry, which contained unlike the others both the substantive and procedural elements in one recording, had no entry of "hour" in the margin but did give the date and place.

III

It must be said here immediately, with respect to this last log record, that there is no purporting to record that Appellant failed to stand the 1600-2000 watch on 3 August. It would appear that the Investigating Officer misread Appellant's recorded reply and mistakenly concluded that Appellant had been "logged" for failing to stand both his 4-8 watches on 3 August, leading to preferral of a single specification, the fifth, to that effect. The Administrative Law Judge's conclusion at hearing that these was no evidence as to failure to stand a 1600-2000 watch on 3 August 1976 was eminently correct.

The same cannot be said for the treatment accorded the other matters in the fourth and fifth specifications.

In the first place, the Administrative Law Judge made a cardinal and dispositive point of the fact that the substantive entry relative to the 0400-0800 watch on 2 August was timed "0345" in the margin. With draconian application of part of a principle he says of this: "On its face it was made 15 minutes prior to the beginning of the watch which he is alleged to have failed to stand. This internal inconsistency in the absence of any other evidence, detracts from this log entry's efficacy to support the Fourth specification with respect to the morning watch, 4 to 8 A.M. on 2 August 1976."

One pertinent fact is that, somewhat inconsistently for rigid application of perceived rules, the Administrative Law Judge overlooked or ignored the fact that the first log entry in evidence, dealing with the 0315 failure to report for letting go and the 0400-0800 watch (both on 31 July), carried for the substantive entry a marginal note of "0315" as the hour. This was, of course, the precise hour of the "letting go" maneuver and three quarters of an hour before the beginning of the 0400-0800 watch.

If the Administrative Law Judge were correct in his treatment of the 0400-0800 offense of 2 August I would as a matter of principle have to set aside the findings as to the 0400-0800 watch of 31 July, if not indeed also as to the 0345 offense of that date, on the same grounds. This is not necessary, however.

It is clear, for one thing, that this master, in giving the date and hour of the substantive transaction at times gives the approximate hour at which the events began no matter how long the events recorded took. 0315, a time for reporting for "letting go" on 31 July is chosen as a time of commencement of offenses made subject to that entry although the offenses recorded continue

through 0800 of that date. Similarly, as it is a customary practice for seamen to report (and they are expected to report) ten to fifteen minutes before the time at which a watch duty and responsibility must be assumed, 0345 is a reasonable statement of the hour at which the dereliction was known to commence. On the face of the matter thus far considered,given the necessary latitude that must be given to masters concerned with the entire operation of a vessel whose models for recording entries are not, and cannot be, etched on bronze tablets, it cannot be said that the identification supplied by this master was not in "substantial compliance" with the statute.

Further, however, the Administrative Law Judge alluded to "an absence of any other evidence" as affecting his ruling. There was other evidence relevant to the matter in the same entry. The master, separating in this case his substantive and procedural entries, recorded his procedural entry as of "1500" on that same date. He recorded there that the "above entry" was read to Appellant and that Appellant had made no reply and had refused to sign. The master added, "He then said he wanted to get off the ship mutual consent..." If any more than a captious doubt could remain as to the validity of the substantive entry it would naturally be removed by the timely reading of the statement of the offense to Appellant, his refusal to sign and initial failure to reply, and his tangent statement that he wished to get off the ship.

Although it will not serve to alter the Administrative Law Judge's dismissal of the allegation that Appellant failed to stand the 0400-0800 watch on 2 August 1976, I find that the the dismissal was based on an erroneous ruling and I hold therefore, consistently, that the findings based on the entry for the events of 31 July 1976 are supported.

With respect to the dismissal of the allegations relative to the second, 1600-2000, watch of 2 August and the 0400-0800 watch of 3 August some comment is also pertinent because, again, the Administrative Law Judge was apparently in error, and Appellant has attempted to convert this into a direct attack upon the log entries which were accorded the fullest weight under the regulation and the governing principle.

Of this matter, the Administrative Law Judge wrote after recounting the substance of the recital:

> "His [Appellant's] reply addresses his 'inability' to stand his 1600 to 2000 watch on 3 August 1976. But the log entry does not deal with that watch. It deals with the 1600 to 2000 watch of 2 August 1976 and 0400-0800 watch of 3 August

> 1976. Neither of these watches are spoken to in Respondent's reply. It cannot be ascertained from the evidence whether this omission was intentional or unintentional, or was the result of commingling two alleged offenses this doubt is resolved in favor of respondent...there is a failure to support the allegations ... as to the 1600 to 2000 watch ... as well as a failure to support the allegations ... as to the 0400 to 0800 watch. There a no proof whatsoever as to the 1600 to 2000 watch on the 3rd of August 1976,."

Appellant reads this as a comment on the integrity of the log entry and as voicing suspicion of the methods of the master, a suspicion which he avers should attach to all the entries, since it appears to admit that master had made an intentional or unintentional misrepresentation in the log in suppressing a seaman's reply.

Even in context, the words quoted seem just as well to refer to the failure of Appellant to address himself to the two offenses as to which he could comment, with the "intentional or unintentional" omission alluded to by the Administrative Law Judge being his and not the master's. Nevertheless, a fair reading of the log entry renders the potentially ambiguous discussion of it in the initial decision a minor exercise in unwarranted speculation.

It is first noted that the time of giving notice of the log entry is obviously before 1600 because the comment that the master records is a statement of Appellant's intent not to stand the 1600-2000 watch. There was, despite the Investigating Officer's apparent error in drawing up charges, no offense of failing to stand a 1600-2000 watch on that date, and the reply to the substance of the entry afforded to the seaman was to the watches not stood. It seems clear here that just as the comment made by Appellant to the entry relative to the 0800-1200 watch of desire to get off the vessel, the comment made here was not to the watches not stood but another tangent statement of intent not to stand his next assigned watch. There was no need to speculate on "intentional or unintentional" omissions by either Appellant or the master, and thus to raise the spectre of deficiency in the entry. Given the opportunity to reply to the entry made as to his failures Appellant simply chose to announce his intent as to the immediate future as he had previously chosen not to discuss his past dereliction but rather to declare his desire for the future. On this, then, it may be said here that the Administrative Law Judge's discussion of this log entry does not, again although the dismissal of the allegations is not hereby affected, necessitate a reevaluation of the log entries which were accorded full weight. That a mistake has been made to Appellant's undeserved advantage in one respect does not entitle him to further errors which were not made.

IV

On this matter as a whole another apparent misunderstanding should be dispelled. The regulation at 46 CFR 5.20-107 is sometimes, and all too often, not appreciated. It declares first, in specific recognition of a legislative provision for evidence in civil proceedings, that an official log book entry of a vessel which carries one is an entry made in the regular course of business. It goes on to declare that such an entry made in substantial compliance with the relevant specific statute governing the mode and manner of official log book entries carries with it a greater weight than a mere "business entry." When so made, the entry constitutes "prima facie evidence" of the matters recited.

Note must be made that the term used is not the one so familiar in judicial review of administrative proceedings, "substantial evidence." It should be clear that "prima facie evidence" is something more than "substantial evidence;" otherwise the regulation would be superfluous. Prima facie evidence is evidence which, if not rebutted, leads to only one reasonable conclusion; i.e., if such is the only evidence of record, in a proceeding like this, the allegations which it supports must be found proved; no other reasonable conclusion can be drawn from the evidence. The converse of this is not, as administrative law judges appear at times to believe, that an official log book entry which does not substantially comply with the requirements of 46 U.S.C. 702 cannot be substantial evidence of sufficiency on which to predicate findings. With the test that substantial evidence is evidence from which a reasonable man could infer the existence of a fact, there is little doubt that despite a technical deficiency in an official log book entry, which takes it out of substantial compliance with 46 U.S.C. 702, its force would easily still persuade a reasonable man that it was a reliable record of events. Specifically for this case, assuming that there had been, as the Administrative Law Judge was willing to believe, a failure of substantial compliance with the statute, there is no bar to a reasonable man's concluding from the record that Appellant did not in fact stand the two watches discussed in the entry to which no weight whatever was given at hearing.

Another element must be mentioned here in connection with the utter rejection of the log entries relative to the specifications dismissed. An Administrative law judge is to consider the whole record made before him in fairly arriving at findings. Assuming again that there was a failure of substantial compliance with 46 U.C.S. 702 in the making of the log entries supportive of the fourth and fifth specifications, and noting again that these entries still constituted evidence in the case, not only was this evidence not rebutted but Appellant specifically testified on

examination by his counsel:

> "Q. Did there come a time when you did not perform your normal watch or work aboard the ship? . . .
>
> Yes
>
> Q. When was that?
>
> A. July the 1st, the 31st, the dates of the log, August the 1st, 2nd, and 3rd." R-41

What is obvious here is that on this record there can be no doubt whatever that Appellant did not perform on the assignments identified in the specifications, not only because there is reasonably persuasive evidence that he did not but because he himself admitted the bare factual elements of the failures. In truth, his position at hearing was one of "confession and avoidance." He affirmatively asserted that his acknowledged failures were excusable because of illness.

V

The Administrative Law Judge was not persuaded by the evidence of medical treatment which Appellant submitted as to his condition at other times and places. It was not by any means, as Appellant now asserts, "overwhelming," and the totality was well within the discretionary judgment of the trier of facts. Of most significance here is the contemporaneous attitude of Appellant who did not care to assert illness until the third day of this series of derelictions, an assertion which, however, was accompanied by a contemporary observation and recording, in his presence, of "hangover."

VI

Finally, in urging for reversal of the findings, Appellant asserts that the evidence was inadmissible since the procedure followed by the master in recording the offenses in the official log book was violative of the National Labor Relations Act. In support of this he cites a decision of the National Labor Relations Board, Mt. Vernon Tanker Co. (1975), 89 L.R.R.M. 1773. That Board referred to, and Appellant also cites, language in National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251 (1975) to the effect that "requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline" is a violation of the Labor Relations Act.

I am not at all sure that the Board was correct in believing

that the specifically authorized confrontation under the laws governing offenses of seamen is a "requiring" of an "investigatory interview" with the seaman, but that does not matter. The Board's decision does not purport to infringe upon areas outside its jurisdiction. In reaching the opinion that the master of the vessel in that case had violated "Section 8(a)(1) of the Act" by refusing to grant the seaman's request to have a union representative present at his interview and by punishing the seaman for insisting on his right to have the representative present, the Board saw no bar to the action of "logging" for the initial offense. It said, " We do not find that [the seaman]...may not be disciplined for his refusal to obey the lawful order to leave the engineroom pursuant to the dictates of 46 U.S.C. 701."

The decision of the board is irrelevant to the matter of the lawful use of official log books in these proceedings. Further, even within the proper scope of the Board's activity, the decision is not in point because at not time did Appellant ask that any person, union representative or otherwise, be present when the log entries were read to him pursuant to statute.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 9 March 1977, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 11th day of April 1978.

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